87-1924

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

RICHARD E. WILMSHURST, 49ER
CHEVROLET, INC.

Petitioner,

v.

CHEVROLET MOTOR DIVISION,
GENERAL MOTORS CORPORATION,

Respondent,

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is a new motor vehicle dealer, who files an action under the Dealer Day in Court Act (Title 15 U.S.C. § 1221 et seq), in order to preserve his cause of action because of the short three year statute of limitations, subject to dismissal under Rule 41 (b) after the dealer has exhausted his state administrative remedies allowed under the Act, but prior to the action being brought to trial,

2. May a Circuit Court panel ignore the holdings of this Court as well as the rules established by published opnions of its own circuit and render such adverse opinion to established holdings in an unpublished memorandum opinion?

3. Whether the business community should rely on the opinions of this Court and Circuit Courts in light of the doctrine of **"stare decisis,"** to plan their business lives and to rely upon the holdings in those decisions to guide the manner in which disputes will be settled within business relationships.

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No.

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OCTOBER TERM, 1987

RICHARD E. WILMSHURST,
49ER CHEVROLET, INC.,
Petitioner,

VS.

CHEVROLET MOTOR DIVISION,
GENERAL MOTORS CORPORATION,
Respondent,

PETITION FOR A WRIT OF CERTIORARI

Petitioners, Richard E. Wilmshurst and 49ER Chevrolet, Inc. respectfully pray that a writ of certiorari issue to review the dismissal of petitioner's Dealer Day in Court Action that was upheld by the Court of Appeals for the Ninth Circuit in its memorandum opinion filed on December 10, 1987 with rehearing denied and filed on February 8, 1988.

OPINION OF THE COURT BELOW

The opinion of the Court of Appeals is an unpublished opinion entitled *Wilmshurst v. Chevrolet Motor Div. of General Motors Corp.* noted at 835 F.2nd 1437, and is attached as appendix A.

JURISDICTION

The judgment of the Court of Appeals, Ninth Circuit December 10, 1987. The petition for rehearing or rehearing in banc was denied and filed on Februrary 8, 1988. The instant is timely filed under the provisions of Rule 20 of the United States Supreme Court, and 28 U.S.C. Section 2101 (c).

The jurisdiction of this court is invoked pursuant to 28 U.S.C. 1254 (1).

STATUTORY PROVISIONS

1. *15 U.S.C. Section 1221:* Definitions as used in this chapter -

(a) The term "automobile manufacturer" shall mean any person, partnership, corporation, association, or other form of business enterprise engaged in the manufacturing or assembling of passenger cars, trucks, or station wagons, including any person, partnership, or corporation which acts for and is under the control of such manufacturer or assembler in connection with the distribution of said automobile vehicles.

(b) The term "franchise" shall mean the written agreement or contract between any automobile manufacturer engaged in commerce and any automobile dealer which purports to fix the legal rights and liabilites of the parties to such agreement or contract.

(c) The term "automobile dealer" shall mean any person, partnership, corporation, association, or other form of business enterprise resident in the United States or Territory thereof or in the District of Columbia operating under the terms of a franchise and engaged in the sale or distribution of passenger cars, trucks, or station wagons.

(d) The term "commerce" shall mean commerce among the several States of the United States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or among the Territories or between any Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation.

(e) The term "good faith" shall mean the duty of each party to any franchise, and all officers, employees, or agents thereof to act in a fair and equitable manner toward each other so as to guarantee the one party freedom from coercion, intimidation, or threats of coercion or intimidation from the other party: *Provided,* that recommendation, endorsement, exposition, persuasion, urging or argument shall not be deemed to constitute a lack of good faith.

2. *15 U.S.C. Section 1222: Authorization of suits against manufacturers; amount of recovery; defenses*

An automobile dealer may bring suit against any automobile manufacturer engaged in commerce, in any district court of the United States in the district in which said manufacturer resides, or is found, or has an agent, without respect to the amount in controversy, and shall recover the damages by him sustained and cost of suit by reason of the failure of said automobile manufacturer from and after August 8, 1956 to act in good faith in performing or complying with any of the terms or provisions of the franchise, or in terminating, canceling, or not renewing the franchise with said dealer: *Provided,* That in any suit the manufacturer shall not be barred from asserting in defense of any such action the failure of the dealer to act in good faith.

3. *15 U.S.C. Section 1223. Limitations*

Any action brought pursuant to this chapter shall be

forever barred unless commenced within three years after the cause of action shall have accrued.

4. *15 U.S.C. Section 1224. Antitrust laws as affected*

No provision of this chapter shall repeal, modify, or supersede, directly or indirectly, any provision of the antitrust laws of the United States.

5. *15 U.S.C. Section 1225. State Law as affected*

This chapter shall not invalidate any provision of the laws of any state except insofar as there is a direct conflict between any express provision of this chapter and an express provision of State law which cannot be reconciled.

FEDERAL RULES OF CIVIL PROCEDURE

6. *Rule 41.* Dismissal of actions

(b) *Involuntary Dismissal: Effect thereof.*

For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant . . . Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or failure to join a party under Rule 19, operates as an adjudication upon the merits.

STATEMENT OF THE CASE

Petitioners filed this action on October 30, 1980 for damages pursuant to the Dealer Day in Court Act ("DDICA") (15 U.S.C. § 1221 et seq.) and for injunctive relief pursuant to Rule 65 of the Federal

Rules of Civil Procedure. Relief was requested for damages that took place from 1977 through the date of filing. The action was filed after petitioners had participated in a hearing before the New Motor Vehicle Board ("NMVB") of the State of California pursuant to California Automobile Franchise Act (Calif. Vehicle Code § 3060 et seq.) wherein Chevrolet's notice of non-renewal of 49ER Chevrolet's franchise agreement was later set aside by the NMVB.

After DDICA action was filed, respondent appealed the decision of the NMVB favorable to petitioners. The decision of the NMVB was reversed by the San Francisco Superior Court and the reversal was upheld in *Chevrolet Motor Division v. New Motor Vehicle Board* (1983) 146 C.A.3d 533, *cert. denied* (1984) 465 U.S. 1103.

In 1981, petitioners were again notified by respondents that their Chevrolet franchise would not be renewed. In this hearing, respondents were successful before the NMVB and petitioners appealed the decision to the Calaveras County Superior Court where the decision of the NMVB was upheld; *Richard E. Wilmshurst et al v. New Motor Vehicle Board* (1985) 3 Civil No. 23426, (1985) ____ U.S. ____, 106 S. Ct. 300.

On December 18, 1981, petitioners filed a Motion for a Temporary Restraining Order and Permanent Injunction, in Federal District Court in the subject action, the Temporary Restraining Order and Permanent Injunction were denied and a late filed appeal was dismissed by the Court of Appeals, Ninth Circuit.

On December 12, 1985, respondents filed a Motion to Dismiss, pursuant to Rule 41(b) of the Federal Rules of Civil Procedure, and for Summary Judgment. On January 16, 1986, the motion was heard and was granted on January 23, 1986 with judgment being entered that day. Petitioner's notice of appeal was filed on February 24, 1986.

REASON FOR GRANTING THE WRIT

I

CONGRESS DID NOT INTEND THAT AN AUTOMOBILE DEALER BE PLACED IN A "CATCH-22" SITUATION IN DETERMINING WHEN TO FILE A DEALER DAY IN COURT ACTION WHEN HE ALSO CHOSE TO EXHAUST HIS STATE ADMINISTRATIVE REMEDIES IN ORDER TO SAVE THE BUSINESS HE HAD GENERATED FOR HIS FRANCHISED BRAND AUTOMOBILE SOLD OVER MANY YEARS.

The DDICA is more important today than it was when it was passed by Congress in 1956. The automobile marketplace is greater in dollar volume but has fewer dealers and true domestic manufacturers. Soon, six foreign-owned manufacturers will be producing automobiles in plants in the United States. Today, the competition among manufacturers is great and coercion and intimidation by manufacturers against their dealers is a fact of life.

Automobile dealers throughout the United States look to the DDICA and state laws like the California Automobile Franchise Act[1] to protect their business investments and reduce unfair trade practices by the automobile manufactuer. It is of national importance that the right to damages provided by the DDICA not be denied dealers

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1/ The California Automobile Franchise Act (Vehicle Code § 3060 et seq.) was created in 1973 and expanded the power of the New Motor Vehicle Board to review decisions of the Department of Motor Vehicles. The Board was also empowered to hold hearings with regard to the establishment of new franchises, the relocation of existing franchises and franchise cancellations and non-renewals. The California Legislature expressly stated that this Act was passed "in order to avoid undue control of the independent new motor vehicle dealer by the vehicle manufacturer or distributor . . ." The Act provides review of activities that may severely injure a dealer's established business while having little or no effect on the business of the manufacturer. The Act does not provide the dealer with money damages, as damages are reserved to the federal courts by the DDICA.

by decisions not published and that do not follow the decisions and reasoning of this Court.

This Court in *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox,* 439 U.S. 96, 101, noted Congress' and States' basis for enacting legislation in an effort to protect automobile dealers from perceived abusive and oppressive acts by automobile manufacturers.

THE "CATCH-22" SITUATION

Petitioners ("49ER") filed their DDICA action on October 30, 1980 for two legal reasons. *First,* to protect the standing status of filing as a dealer. Since the 49ER Chevrolet franchise agreement terminated on October 31, 1980, by the fact of non-renewal, if respondents' ("GM") legal argument of termination by expiration of the current franchise was accepted by an appellate court, 49ER might not have standing to bring a DDICA action at a later date. *Second,* to preserve the cause of action for damages that occurred three years prior to the date of filing the action.

E.R. Walker v. Ford Motor Company, 241 Fed. Supp. 526 (1965) provides the caveat to dealers with a DDICA action that a state administrative action brought prior to the filing of the DDICA action does not toll the three year statute of limitations (15 U.S.C. 1223). 49ER, following the authority of *E.R. Walker,* filed their DDICA action in October of 1980 in order not to fall into the late-filing trap.

GM appealed the first administrative decision which was final as to all courts in 1984 when this Court denied certiorari (465 U.S. 1163). It is important to note that the State of California and the California New Motor Car Dealer Associations participated in this action through this Court. If 49ER had filed its DDICA action in 1984, the damage that 49ER suffered from 1977 through 1981 would not have been compensable due to the three year statute of limitations. The second administrative action was final in 1985 when this Court denied certiorari (____ U.S. ____ , 106 S. Ct. 300). Shortly after certiorari was denied in the second administrative action GM moved under Rule 41 (b) FRCP to dismiss the 49ER DDICA action.

The district court dismissed under Rule 41 (b) FRCP and the court of appeals affirmed.

The statute-of-limitations issue that brought about the *"CATCH-22"* action filing problem was raised before each court, however, there is *no* mention in either opinion that the issue was considered. In the court of appeals, 49ER discussed this Court's holding in *United States v. Michigan National Corporation,* 419 U.S. 1 (1974) where the early filing of actions with short statute of limitations was reviewed. The court of appeals' opinion gave no indication it considered this Court's opinion in *Michigan National.*

It is obvious from the comments in the Congressional Committee Report in 1956 cited by this Court in *Orrin W. Fox,* supra, that it was Congress' intent that dealers be given an action for damages due to intimidation and coercion. Congress also allowed the states latitude in developing other methods of protecting dealers rights when 15 U.S.C. § 1225 became part of the act.

The law is replete with cases where large franchisors have retaliated against franchisees for speaking out against the conduct of the franchisor with the penalty being franchise termination.

Congress left the review of franchise termination to the states and withheld the award for damages for intimidation and coercion to the federal courts. The Congressional Record and the DDICA provide the background for this Court to find that the intent of Congress would not allow a dealer to be put in the position where he would have to choose between damages due for the violation of the DDICA or exhausting his state administrative remedies in order to save his automobile business whose original injury brought about the litigation.

The *"CATCH-22" SITUATION* exhibited in this proceeding is fundamentally unfair and unjust to the automobile dealers of the United States and should be addressed by this Court. There is no need for new legislation; the remedies to solve dealer/manufacturer disputes is already law. The federal trial courts need guidance in the application of

this Court's policy in allowing the tolling of the statute of limitations, when they are short, so that dealers may receive the complete relief Congress intended from a DDICA action. This opinion is also needed to provide equal application of the law throughout the United States.

II

THE CIRCUIT COURT COMMITTED JUDICIAL ERROR WHEN IT DID NOT FOLLOW THE PRECEDENT ESTABLISHED BY THIS COURT OR FOLLOW THE OPINIONS OF ITS OWN CIRCUIT WHEN REVIEWING A CASE DISMISSED UNDER RULE 41 (b) OF THE FEDERAL RULES OF CIVIL PROCEDURE.

One of the most serious decisions a court makes in a civil action is to dismiss the proceeding before trial on the motion of the defendant. Dismissal is a decision that must be reviewed with extreme care by the trial court and the lower court's decision must meet the standards of review established by this Court, and if it does, then it must meet the standards of review of the circuit court. In this proceeding the circuit court panel did not consider the holding in *United States v. Michigan National Corporation,* supra or follow the standards of its own circuit in *Hamilton v. Neptune Orient Lines, Ltd.,* 811 F.2d 498 (1987) or *Morrison-Knudsen v. Chg Inter., Inc.* 811 F.2d 1209 (1987).

Every litigant is entitled to equal protection and application of the law. The right to an appeal requires the appellate review apply the rules of law established by the Supreme Court and the precedent published by its circuit. The circuit court did not meet the standard of review as a matter of law.

In *Michigan National Corporation,* supra, this Court reversed and remanded a dismissal against the Government under reasoning that would apply to automobile dealers throughout the United States if the early filing of the DDICA action was to protect the loss of the recovery of damages due to the DDICA's three year statute of limitations. The court of appeals failed to take this case into consideration.

The circuit court placed a very unusual duty upon 49ER in making its decision. The circuit court's opinion states:

> "The district court never had the opportunity to decide whether state administrative remedies should be exhausted before 49ER could pursue it DDICA claims because 49ER never asked the court for a stay or any ruling on the issue."

Indeed. The action was stayed by the trial court, as the trial court did not notify 49ER it must proceed during the time the administrative process was being exhausted[2]. The trial court manages its calendar; when the trial court did not notify 49ER of impending dismissal for lack of moving the DDICA case to trial, it was not incumbent upon 49ER to question the court's wisdom in allowing the case to be stayed until the State administrative process had been exhausted.

Did the trial court apply the *Pullman* doctrine cited in *Michigan National Corportion?* Under *Michigan,* wasn't it proper that DDICA actions be stayed until the filing dealer had exhausted his state administrative remedies? Shouldn't *Michigan* be a standard applied to DDICA actions on a national basis?

At oral argument, petitioners brought the current cases of *Hamilton* and *Morrison-Knudsen,* supra, to the attention of the court of appeals; the cases were not mentioned or distinguished in the opinion.

In *Hamilton,* the circuit court held certain standards *must* be met by the district court prior to dismissal being allowed upon appellate

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2/ 49ER did not move for a stay as the court had apparently stayed the action on its own motion. The court was aware that 49ER and GM were involved in New Motor Vehicle Board hearings and it appeared the court was following the doctrine of the exhaustion of administrative remedies. If a district court proceeds in an action as a party believes is the proper manner, there would be no conceivable reason why a motion would be made questioning the court's reasoning. If GM believed the court was in error by waiting until the state administrative action was final, it was GM's obligation to move the court for other action.

review. *Hamilton* requires that a district judge meet his obligation to warn the plaintiff of imminent dismissal. *Hamilton* also requires that a meaningful alternative to dismissal be examined. If the court of appeals had followed the holding in *Hamilton* the proceeding would have been remanded.

Morrison-Knudsen Co., Inc. follows this Court's direction in *Hamilton,* where, in regard to the possible application of the doctrine of the *exhaustion of administrative remedies,* the court holds that when there is a statute-of-limitations problem the application of the doctrine of the *exhaustion of administrative remedies* might be the best accommodation for the competing interests.

The circuit court ignored precedent when it decided this proceeding on appeal. Petitioners proceeded as the current law directs, however, they are left with a memorandum opinion that meets no judicial standard and violates Congress' promise to automobile dealers that they will receive redress for damages for intimidation and coercion.

To provide the benefits of the protection of the DDICA, that Congress intended, for automobile dealers through the United States, this Court should apply the doctrine of the *exhaustion of administrative remedies* to the early filing of a DDICA action while the dealer is exhausting his state administrative remedies in an attempt to save the years of customers he has earned for himself and his franchisor.

III

THIS COURT SHOULD DETERMINE FOR THE LOWER COURTS, WHAT PART "STARE DECISIS" WILL PLAY IN APPLYING THE LAW OF THE SUPREME COURT TO DDICA LITIGATION.

The new motor vehicle business throughout the United States is a long term business. The investment for the nation's dealers is large, as is the investment for the manufacturer. Dealers and manufacturers spend years developing their market share and each make long term invest-

ments of capital; the dealer's investment can be, and most of the time is, his sole or largest investment of his life. The rules of law that apply to this relationship must meet the tests of time and be expressed by the Supreme Court so there will be equal application throughout the United States.

The automobile dealers throughout the United States representing the same manufacturer, have the same franchise contract. The policies of the manufacturer apply to the dealers in all fifty states in the same manner. The DDICA was passed by Congress to apply to all dealers and manufacturers in the United States in the same manner in each state, procedurally in each district court and on appeal to a circuit court with the same outcome if the cases are in point.

However, this is not the case today.

An American businessman places his life's earnings in the hands of our legal system. He hires attorneys trained in the law to assist him in guiding his business to conform to the laws, both by statute and decisions of our highest courts. He trusts the court system to follow the rules established by the Supreme Court and the laws as Congress intended them to be applied. This is the promise the system makes to him. In actuality, is this how our legal system operates? Do the lower courts follow the intent of Congress and the rules established by this Court? The opinion of the court of appeal in this case says they do not.

What has happened to "stare decisis" in modern day law? Are appeals taken to circuit courts, when there is a Supreme Court decision on the point, because the circuit court may have a reputation for not following the doctrine of "stare decisis?"

Do the lower courts look for and to Supreme Court decisions for guidance before they strike out on their own to reach a decision? In this case it appears they do not. What can be done so that settled matters will not become unsettled when a court of appeals panel decides *not to follow* "stare decisis?"

What will protect the interests of a small businessman when "stare

decisis" is ignored, his damage action dismissed and the memorandum opinion, although contrary to the law, is but a notation in the Federal Reporter?

The American automobile dealer is a small businessman who has his life savings invested in his business. He may establish a pension plan for him and his employees, if he is large enough, or sell his business in his later years for value and use those funds to support him and his family in retirement. The automobile business is a long term business, with many devoting fifty years of their lives to the business. The automobile business is a large part of our national economy and the DDICA was designed to protect those in the retail business from the over reaching of the world's largest manufacturing corporations. The DDICA is without one set of procedural rules after thirty-two (32) years as the law of our land. Does this fact defeat the Congressional purpose of the Act?

The doctrine of "stare decisis," has not been popular in our legal system; *The Development Of The Doctrine Of Stare Decisis and The Extent To Which It Should Be Applied, Washington Law Review Volume 21, 158 (1946)* attests to this fact.

Some of the points in favor of "stare decisis" found in *The Development Of The Doctrine . . .*, supra,

> "Those reasons are stability and certainty in the law, and *uniformity of treatment of all litigants."* (emphases added)
>
> "It would be exceedingly difficult for a citizen to conduct his business or to deal with his property or to carry on satisfactorily many of the affairs of life, if he could not count upon the continued recognition of the principle of law in effect when he is compelled to act."

Will the holdings of this Court on issues involved in the application of the DDICA be applied to DDICA actions in all circuits? Will automobile dealers in Wisconsin be allowed to file a DDICA action

when their injury is realized and be allowed to exhaust their administrative remedies prior to trial? Will California dealers be required to go to trial in an earlier filed DDICA action while involved in the State administrative process or have their action dismissed by the manufacture's motion after the administrative process has been exhausted but before trial?

These are questions of national importance to automobile dealers throughout the United States. Will "stare decisis" provide one set of rules that will be applied throughout the United States and give uniformity of treatment to all dealers?

CONCLUSION

The review of dealer termination and non-renewal has been left to the states pursuant to 15 U.S.C. § 1225 by way of administrative review.

It is often the practice of vehicle manufacturers to terminate or non-renew a dealer's franchise when he might complain to the manufacturer of the manufacturer's practices which are intimidating, laced with coercion and for the financial damages caused to the dealer's business by those acts.

The message given to all the manufactuer's dealers is, you may not like the way we play the game but complain and you won't even be allowed to play.

This type of DDICA suppresion by intimidation can be lessened if the dealer's early filed DDICA action will be stayed by the application of the doctrine of the exhaustion of administrative remedies while the dealer has his franchise termination reviewed in the state administrative process.

A national policy is needed to protect dealers throughout the

United States.

Dated: May 1, 1988

Richard E. Wilmshurst
Petitioner, Pro se

APPENDICES

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RICHARD E. WILMSHURST; 49ER CHEVROLET, INC.	)	No. 86-1739
	)	D.C. No. CV-S-80-861-PCW
Plaintiffs/Appellants,	)	
v.	)	
CHEVROLET MOTOR Division of General Motors Corporation,	)	MEMORANDUM*
Defendant/Appellee.	)	

On Appeal from the United States District Court
for the Eastern District of California
Philip C. Wilkins, District Judge, Presiding

Argued and Submitted — September 18, 1987
San Francisco, California
(Filed December 10, 1987)

Before: CANBY and BOOCHEVER, Circuit Judges, and PFAELZER,** District Judge.

49er Chevrolet and Richard E. Wilmshurst (49er) appeal the district court's granting of Chevrolet Motor Division's (Chevrolet) motion to dismiss 49er's Dealers Day in Court Act (DDICA), 15 U.S.C. §§ 1221-25 (1982), claim pursuant to Fed. R. Civ. P. 41(b) for failure to prosecute.

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*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

**Honorable Mariana R. Pfaelzer, United States District Judge for the Central District of California, sitting by designation.

We review for an abuse of discretion a district court's order dismissing an action for lack of prosecution pursuant to Fed. R. Civ. P. 41(b) *Henderson v. Duncan,* 779 F.2d 1421, 1423 (9th Cir. 1986); *Ash v. Cvetkov,* 739 F.2d 493, 496 (9th Cir. 1984), *cert. denied, 470 U.S. 1007 (1985).*

The record reveals that no action was taken in this case from September 1982 to December 1985. 49er's excuse for this three-year delay in prosecuting its DDICA claim is that 49er was pursuing its state administrative remedies and corresponding judicial review. 49er claims it was required to exhaust its state administrative remedies before litigation its DDICA claims and that the case was filed in October 1980 merely to toll the three-year statute of limitations.

The district court was required to weigh the following factors in determining whether to dismiss for lack of prosecution: (1) the public interest in expeditious resolution of litigation, (2) the court's need to manage its docket, (3) the risk of prejudice to the defendants, (4) the public policy favoring disposition of cases on the merits, and (5) the availabilitiy of less drastic sanctions. *Ash,* 739 F.2d at 496.

The district court in issuing its order for dismissal did not make specific findings to show that it considered the five essential factors. Although specific findings would be beneficial as an aid to our review, the district court was not required to make such findings. When such findings are not made, we must review the record independently to determine whether the court abused its discretion. *Id.*

Chevrolet cites two cases, Hollenback v. California Western R.R., 465 F.2d 122 (9th Cir. 1972), and *Sellick v. Helson,* 459 F.2d 670 (9th Cir. 1972), for the proposition that a lengthy period of inactivity is itself sufficient to justify dismissal. These two cases are distinguishable from the case at hand. In *Hollenback,* defendant moved for dismissal and plaintiff furnished no valid reason for keeping the case alive. In *Sellick,* the case was dismissed without prejudice because of laches, and plaintiff did not amend his complaint until twenty months later, at which time the case was dismissed with prejudice.

This court in *Nealey v. Transportation Maritima Mexicana, S.A.*, 662 F.2d 1275, 1280 (9th Cir. 1980), stated that:

> [N]either delay nor prejudice can be viewed in isolation. The two factors are often integrally related. As we noted in *Pearson v. Dennison,* [353 F2d 24, 28 (9th Cir. 1965)] "[t]he longer the delay, the more likely prejudice becomes." It is therefore appropriate to analyze the relationship between the two . . . Only *unreasonable* delay will support a dismissal for lack of prosecution, *see Anderson v. Air West, Inc.,* [542 F.2d 522, 524 (9th Cir. 1976)] and unreasonableness is not inherent in every lapse of time.

Unreasonable delay, however, does create a presumption of injury to the defendant, and such delay must also be considered together with the competing concern of disposing of cases on their merits. *Ash,* 739 F.2d at 496.

A delay of three years, unless justified for good reason should be regarded as unreasonable. 49er argues that the delay was necessary so that administrative remedies could be exhausted. 49er contends that it was required to secure an administrative adjudication of unlawful franchise termination before proceeding with its damage claim.

In *Myers v. Bethlehem Shipbuilding Corp.,* 303 U.S. 41, 50-51 (1938), the Supreme Court held that "no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." No administrative remedy is prescribed in the DDICA, and there is nothing in the legislative history which suggests that Congress intended to make exhaustion a prerequisite to pursuing a DDICA remedy. *See* H.R. Rep. No. 2850, 84th Cong., 2d Sess., *reprinted in* 1956 Code Cong. & Admin. News 4596.

It is within the district court's discretion whether exhaustion of administrative remedies is required when not statutorily prescribed. *Stauffer Chem. Co. v. FDA,* 670 F.2d 106, 107 (ith Cir. 1982). The

district court never had the opportunity to decide whether state administrative remedies should be exhausted before 49er could pursue its DDICA claims because 49er never asked the court for a stay or any ruling on the issue. Having failed to take such action, 49er cannot now rely on the time it spent on state proceedings. Because exhaustion of state administrative remedies is not mandated by the DDICA and 49er failed to seek a stay for its claims, the district court did not abuse its discretion in concluding that the three-year delay in prosecuting the case was unreasonable.

The district court also noted in its Order for Dismissal that 49er may be precluded from obtaining damages because of adverse decisions in the related state administrative and judicial proceedings and litigation in another federal court. The application of the doctrine of res judicata to 49er's DDICA claims is not dispositive in this appeal because the district court did not rule on the issue. The district court nevertheless properly weighed the potential application of the doctrine against the competing concern of disposing of cases on their merits in its decision to dismiss for failure to prosecute. It would appear that 49er has already had at least two bites of the apple.

In light of the unreasonable delay by 49er in prosecuting this case, together with the fact that 49er's claims may well be precluded by prior litigation, we conclude that the district court did not abuse its discretion in ordering the case dismissed for lack of prosecution.

In view of our conclusion, we do not address Chevrolet's contention that its summary judgment motion is an independent ground for deciding the case.

Chevrolet asks that pursuant to 28 U.S.C. § 1912 (1982) and Fed. R. App. P. 38 it be awarded reasonable attorney's fees and double costs incurred in responding to this appeal. Because 49er's arguments with respect to exhaustion of administrative remedies are not frivolous, attorney's fees and double costs are denied.

The district courts judgment dismissing 49er's claim for failure to prosecute is

AFFIRMED.

 (Filed February 9, 1988)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RICHARD E. WILMSHURST; 49ER CHEVROLET, INC.	)	No. 86-1739
	)	D.C. No. CV-S-80-861-PCW
Plaintiffs/Appellants,	)	
v.	)	
CHEVROLET MOTOR Division of General Motors Corporation,	)	O R D E R
Defendant/Appellee.	)	

Before: CANBY and BOOCHEVER, Circuit Judges, and PFAELZER,** District Judge.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing is rejected.

**Honorable Mariana R. Pfaelzer, United States District Judge for the Central District of California, sitting by designation.